

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

ROBERT C. ECHOLS,
Petitioner.

No. 2 CA-CR 2018-0250-PR
Filed November 16, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Petition for Review from the Superior Court in Pinal County
No. S1100CR200701774
The Honorable Lawrence M. Wharton, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Kent P. Volkmer, Pinal County Attorney
By Geraldine L. Roll, Deputy County Attorney, Florence
Counsel for Respondent

Robert C. Echols, Buckeye
In Propria Persona

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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

ECKERSTROM, Chief Judge:

¶1 Robert Echols seeks review of the trial court's order summarily denying his successive and untimely request for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Echols has not shown such abuse here.

¶2 After a jury trial, Echols was convicted of two counts of discharging a firearm at a residential structure and ten counts of aggravated assault. The trial court sentenced him to a combination of consecutive and concurrent and presumptive prison terms totaling sixty-eight years. We affirmed his convictions and sentences on appeal. *State v. Echols*, No. 2 CA-CR 2008-0271 (Ariz. App. July 8, 2009) (mem. decision). Echols then sought post-conviction relief, which the trial court denied, and this court denied relief on review. *State v. Echols*, No. 2 CA-CR 2012-0016-PR (Ariz. App. Apr. 3, 2012) (mem. decision).

¶3 In 2017, Echols filed a petition for writ of habeas corpus citing Rule 32 and asserting there was newly discovered evidence that his trial counsel had a conflict of interest violating his due process right. Construing that filing as a notice of post-conviction relief, the trial court appointed counsel. Counsel subsequently filed a notice stating she had reviewed the available record but was unable to determine, based on "limited" discovery provided by the state, whether counsel had a conflict based on his previous representation of a person tangentially related to events resulting in Echols's convictions. Counsel requested that the court review police reports the state had withheld as attorney work product "to determine if there is any basis whatsoever to find that [trial counsel] had any conflict of interest when he represented" Echols.

¶4 Noting it had reviewed the "trial record," the trial court concluded there was nothing indicating a conflict existed and granted Echols leave to file a pro se petition for post-conviction relief. Echols did so, again arguing there existed newly discovered material facts related to

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counsel's alleged conflict of interest. He also asserted that the individual counsel previously had represented would testify that he had been told by a victim that Echols "did not have anything to do with this incident he was just 'mere presence.'" The court summarily denied relief. The court also denied Echols's motion for rehearing, and this petition for review followed.

¶5 On review, Echols restates his claim of newly discovered evidence, and asserts he was entitled to an evidentiary hearing. To be entitled to an evidentiary hearing, Echols must have "alleged facts which, if true, would probably have changed" the outcome of his case. *State v. Amaral*, 239 Ariz. 217, ¶¶ 10-11 (2016) (emphasis omitted). To raise a colorable claim of newly discovered evidence pursuant to Rule 32.1(e), Echols must demonstrate that: (1) the evidence is, in fact, newly discovered; (2) he exercised due diligence in discovering and presenting the evidence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material to the issue involved; and (5) the evidence probably would change the verdict or sentence. *See* Ariz. R. Crim. P. 32.1(e); *State v. Serna*, 167 Ariz. 373, 374 (1991). And, "[e]vidence is not newly discovered unless it was unknown to the trial court, the defendant, or counsel at the time of trial and neither the defendant nor counsel could have known about its existence by the exercise of due diligence." *State v. Saenz*, 197 Ariz. 487, ¶ 13 (App. 2000).

¶6 Even assuming a conflict existed, counsel was aware of it or could have become aware of it through reasonable diligence. *See id.* And, in any event, Rule 32.1(e) does not contemplate a newly discovered claim that trial counsel had a conflict of interest or had been ineffective; rather, it is restricted to "newly discovered material facts . . . [that] probably would . . . change[] the verdict or sentence." *See Serna*, 167 Ariz. at 374 (describing five elements of successful newly discovered evidence claim). Insofar as Echols separately asserts he is entitled to relief under Rule 32.1(e) because counsel's (alleged) former client could offer exculpatory testimony, he has provided no supporting evidence. The former client did not state in his affidavit that he could offer testimony relevant to Echols's convictions. *See State v. Krum*, 183 Ariz. 288, 292-93 (1995) (defendant must "plausibly show" newly discovered evidence exists).

¶7 We grant review but deny relief.